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The Next Step in the Battle Against Forum Shopping: Unilaterally Adopted Arbitration Clauses

Jamie V. Harrmann*

I. INTRODUCTION

The phenomenon known as multijurisdictional litigation is nothing new to the legal world; lawyers are always looking for new and savvy ways to work around unfavorable predictable law in order to achieve greater benefits in their clients' favor. The most popular savvy way to work around the system is to forum shop.

About sixty percent of American publicly traded corporations are incorporated within the state of Delaware.¹ Of this sixty percent, it is likely that many are domiciled in a state other than Delaware. This is because the "corporation need not be, and frequently is not, headquartered in the state where it is incorporated"² Legally, this means that shareholders bringing direct and derivative claims against a corporation not only have more than one choice in deciding where to file a claim, but also have the possibility of filing multiple suits in multiple states.³ The intention of the shareholder plaintiffs who engage in this act is to litigate both claims at the same time, resulting in high litigation costs for the corporation.⁴

Why do shareholders want to file outside of Delaware courts? In Delaware, a cast body of corporate precedent developed from the fact that the majority of corporations are incorporated within the state.⁵

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1. Sara Lewis, *Transforming the "Anywhere but Chancery" Problem into the "Nowhere but Chancery" Solution*, 14 STAN. J.L. BUS. & FIN. 199, 200 (2008).

2. 28 U.S.C. § 1332(c)(1) ("a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business. . . ."); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 943 (Del. Ch. 2013).

3. *Boilermakers*, 73 A.3d at 943.

4. *Id.*

5. Lewis, *supra* note 1, at 200.

This, in turn, creates an extremely predictable forum that tends to weigh against shareholders.⁶

Entering into an unpredictable forum, or multiple forums at the same time, allows shareholders to scare the directors and officers of the corporation with the chance of “unpredictable outcomes” and “long, drawn-out trials.”⁷ Delaware precedent allows directors, officers and shareholders of the corporation, alike, to gage what the result of the trial will be before it starts.⁸ The result is that corporations are unlikely to settle for a high value.⁹ However, if the corporation is not able to predict the outcome of the case, or, if it wants to avoid a lengthy and expensive trial, the possibility of a settlement increases.¹⁰ Consequently, this movement leads to a major push in corporations to adopt forum selection clauses in order to limit where shareholder actions can be brought and to save the corporation valuable time and money.¹¹

In June of 2013, the Delaware Court of Chancery approved unilateral director and officer action to adopt forum selection clauses.¹² These clauses prevent shareholder plaintiffs from seeking multiple jurisdictions in which to file.¹³ The Court of Chancery’s holding in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, which found a unilaterally adopted forum selection clause valid and enforceable, gives corporate directors and officers the tools they need to limit forum shopping effectively.¹⁴ But, adopting a forum selection bylaw is not the only answer corporations have to combat shareholder forum shopping.

What if directors and officers had the ability to prevent litigation altogether? What happens when directors choose to unilaterally adopt mandatory arbitration clauses? After all, an arbitration clause is a “specialized kind of forum selection clause.”¹⁵

Like forum selection clauses, mandatory arbitration bylaws keep shareholders from filing multiple suits in several jurisdictions,¹⁶ saving

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Lewis, *supra* note 1, at 201.

11. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 943-44 (“over 250 publicly traded corporations have adopted such provisions”).

12. *Id.* at 963.

13. *Id.* at 943.

14. *Id.* at 963.

15. Lewis, *supra* note 1, at 208 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

16. Emily Farinacci, *In a Bind: Mandatory Arbitration Clauses in the Corporate Derivative Context*, 28 OHIO ST. J. ON DISP. RESOL. 737, 749 (2013).

a corporation's valuable time¹⁷ and public façade. Not only does the corporation benefit, but shareholders benefit as well because arbitration provides flexibility in how an issue is resolved: instead of a judge, the parties will ideally set forth their claims in front of a neutral arbiter.¹⁸ Not only do the shareholders have the possibility of benefiting, but the directors and officers also benefit because arbitration is generally less costly and is a private matter that occurs behind closed doors away from public eyes and ears.¹⁹ In effect, this neutral arbiter takes away the predictability and bias of the Delaware courts, resulting in the likelihood of a greater settlement.²⁰

Currently, it is unclear whether a Delaware court of law would uphold a unilaterally adopted mandatory arbitration bylaw.²¹ This note argues that the Delaware Court of Chancery, if presented with the issue under the same or similar circumstances as presented in *Boilermakers*, would uphold a unilaterally adopted arbitration clause as valid and enforceable. The following parts provide reasoning and support for the claim. Part II provides a background analysis leading up to the issue. It will introduce the problem of forum shopping and provide an analysis of *Revlon*, the Delaware decision that opened the door for forum selection clauses. Part III provides an in depth analysis of *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* and introduces the relevant common and statutory law the Delaware Court of Chancery may use in a case questioning the validity of a mandatory arbitration clause. Part IV discusses how the Delaware Court of Chancery will likely apply precedent and statutory law and what possible problems the court may experience. Part V analyzes the impact the decision will have on corporations and the relationship between shareholders and corporations. Finally, Part VI provides a brief summarization of the facts and issues presented.

II. BACKGROUND

A. *Revlon: A Breakthrough Case*

Although forum selection clauses are common within transactional exchanges between corporations, prior to 2010, very few forum selec-

17. *Id.*

18. *Id.* at 737.

19. Farinacci, *supra* note 16, at 743, 750.

20. *See id.* at 751 ("arbitration outcomes need not be based upon rules of law . . .").

21. *See e.g.*, Stephen B. Bauerman, *Multi-forum Litigation: Delaware Court of Chancery Upholds Board-Approved Forum Selection Bylaws*, *Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics*, ABA (Nov. 6, 2013), http://www.americanbar.org/publications/blt/2013/07/delaware_insider.html.

tion clauses appeared within the articles of incorporation or bylaws of corporations.²² It was not until the *Revlon*²³ decision of March 16, 2010 that more and more corporations began to add forum selection clauses to their corporate constitutions.²⁴ Though *Revlon* does not deal directly with the forum selection bylaw issue, it was Vice Chancellor J. Travis Laster's analysis of how the "frequent filer" issue could be prevented that gave rise to the possibility of forum selection bylaws within corporate charters.²⁵

In *Revlon*, multiple law firms from multiple states filed claims in the Delaware Chancery regarding the legality of an internal takeover that effectively gave one shareholder control of over 75% of Revlon's voting power.²⁶ As a result of the multiple filings, the firms began to compete for primary control over the litigation.²⁷ A month passed after the date of the original filing before the leadership for plaintiff's counsel was finally determined.²⁸ However, after plaintiffs realized the counsel "literally did nothing," new counsel filed two more representative actions asking Vice Chancellor Laster to determine the leadership structure of the counsel for plaintiff shareholders.²⁹ In the end, Vice Chancellor Laster removed the original counsel and replaced them with the counsel who filed the representative actions.³⁰

As previously mentioned, it was the Vice Chancellor's analysis on how this type of frequent filer issue could be prevented that opened the door to forum selection bylaws. First, Vice Chancellor recognized that "greater judicial oversight of frequent filers" would push claims out of the Delaware Chancery and into other jurisdictions.³¹ He then recognized that if shareholder lawyers began to run to other jurisdictions, boards of directors and stockholders of corporations would be "free to respond" to the flight from Delaware by "selecting an exclu-

22. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate forum Selection Clauses: an Empirical Analysis*, 37 DEL. J. CORP. L. 333, 338 (2012) ("1.49% of publicly traded entities had forum selection provisions in their charters or bylaws." *Id.* at 389).

23. *In re Revlon S'holder Litig.*, 990 A.2d 940 (Del. Ch. 2010).

24. Grundfest, *supra* note 22, at 339.

25. *Id.* at 338. Frequent filers is a phrase then-Vice Chancellor Laster used to describe firms who frequently file in Delaware on behalf of "stockholder's with small ownership stakes." *Revlon*, 990 A.2d at 943.

26. *Revlon*, 990 A.2d at 943-94. The firms included Rosenthal, Monhait & Goddess, P.A. of Delaware, Abbey Spanier Rodd & Abrams, LLP of New York, Glancy & Binkow LLP of California, and Rigrodsky & Long of Florida. *Id.*

27. *Id.* at 944.

28. *Id.* at 946 (the last claim was filed on May 12, 2009 while leadership counsel was determined by consolidation order entered on June 24, 2009).

29. *Id.* at 956, 942.

30. *Id.* at 957, 961.

31. *Revlon*, 990 A.2d at 960.

sive forum for intra-entity disputes.”³² Selecting a particular forum would “provide an efficient and value-promoting locus for dispute resolution” and would prevent shareholder lawyers from “facilitating a system of transactional insurance through quasi-litigation.”³³

As a result of the *Revlon* opinion, many corporations interpret Vice Chancellor Laster’s analysis as a judicial invitation for corporations to include forum selection clauses as a way of restricting where shareholders can file claims. As a result, many corporations adopt forum selection clauses within their bylaws.³⁴

B. *Shareholder Elected and Unilaterally Adopted Bylaws*

While Vice Chancellor Laster did suggest corporations use forum selection clauses to control shareholder litigation, he did not suggest how corporations are to implement the clauses.³⁵ As a consequence, boards of directors are left with two choices in possible routes for adoption of the forum selection bylaws.³⁶

The first option is for the board of directors to ask for a formal shareholder vote to approve the bylaws.³⁷ Stanford Law School Professor Joseph Grundfest’s article, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, suggests that there are three ways a board of directors can introduce a forum selection bylaw to shareholders for a vote. In the first category, the corporation can bundle the forum selection clause with other shareholder proposals.³⁸ For example, in these cases, the forum selection clause can be part of a larger group of clauses. The shareholders will then vote to incorporate the entire group of clauses as part of its already existing corporate governance. The second category includes corporations who rewrite an entirely new charter as a result of reincorporation.³⁹ In these situations, the forum selection clause will already be included within the new charter and the shareholders would vote to incorporate the entire charter. The third category

32. *Id.*

33. *Id.* at 960-61.

34. Grundfest, *supra* note 23, at 339 (“[the] adoption rate of intra-corporate forum selection clauses in organic corporate documents . . . increased by almost a hundred fold in the wake of *Revlon*.”).

35. See *Revlon*, 990 A.2d at 960.

36. See Grundfest, *supra* note 23, at 340, 342.

37. *Id.* at 342. Between 2011 and 2012, seven corporations asked for shareholder approval with five successful cases.

38. *Id.* at 342, 370.

39. See *e.g.*, *id.* at 370.

leaves corporations who propose the forum selection clause, and only the forum selection clause, to the shareholders for a vote.⁴⁰

The second option is for the board of directors to avoid the shareholder vote in its entirety, and unilaterally adopt the bylaws on its own.⁴¹ Chevron and FedEx, among others, fall into this latter category and *Boilermakers Local 154 Retirement Fund v. Chevron Corp* is the consequence of their actions.

III. SUBJECT OPINION

A. Boilermakers Local 154 Retirement Fund v. Chevron Corp: *The First Step*

In *Boilermakers*, two separate groups of shareholders filed suit in the Delaware Court of Chancery (“court”) against Chevron Corporation (“Chevron”) and FedEx Corporation (“FedEx”), and their respective Boards of Directors (collectively, the “Board”), for unilaterally adopting and amending a forum selection bylaw.⁴² Though Chevron and FedEx were the only two corporations that were party to this suit, these two actors were not the only businesses shareholders had claims regarding forum selection clauses against.⁴³ From February 6 to February 23, 2012, “a dozen complaints” bombarded the court – all filed by the same law firm.⁴⁴ Out of the twelve corporations served with the suit, ten corporations repealed their forum selection bylaws, leaving Chevron and FedEx.⁴⁵ As a result of the repeals, the appropriate courts dismissed the complaints against the ten corporations.⁴⁶ Chevron and FedEx refused to repeal their bylaws and answered the complaints, resulting in this case.⁴⁷

40. *Id.* at 370. Category one included Life Technologies Corporation. Category two included CapTerra Financial Group, Pure Bioscience and Williams-Sonoma. Category three included Altera, DirecTV, Insweb, Lighting Science, and Sally Beauty Holdings. *See generally* Grundfest, *supra* note 22, at 370-373.

41. *Id.* at 340.

42. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013). Though the shareholders of the corporation separately filed suit, the Court combined the cases under Del. Ch. Ct. R. 42(a) because the “complaints were nearly identical,” “present[ed] common legal issues,” and were filed a few days apart by “clients of the same law firm” a few days apart. *Id.* at 938.

43. *Id.* at 944.

44. *Id.* The date and corporations are as follows: February 6, Priceline.com, Danaher, Curtiss-Wright, Chevron, AutoNation, and Navistar International; February 7, Franklin Resources, Superior Energy Services, and SPX Corporation; February 13, FedEx and Air Productions & Chemicals; and finally February 23, Jack in the Box, rounding the total count twelve corporations. *Id.* at 944 n. 35.

45. *Boilermakers*, 73 A.3d at 945.

46. *Id.* at 945.

47. *Id.*

Before trial started, then-Vice Chancellor Strine and counsel for Plaintiff shareholders, Chevron and FedEx held a conference to discuss how to proceed with the trial.⁴⁸ The court decided it was best to decide Count I and Count IV first because if the court found that “if the bylaws are invalid, then the Plaintiff’s other as-applied claims [will be] moot.”⁴⁹ But, the court recognized that “if the bylaws are statutorily and contractually valid and enforceable as a facial matter[,]” then the court would consider the fiduciary duty and other “as-applied claims.”⁵⁰ Based on this decision, the court focused its concern on two counts; Count I and Count IV. Count I alleged that the Boards went beyond their authority under the Delaware General Corporation Law (“DGCL”), and thus the bylaws were “statutorily invalid.”⁵¹ Count IV alleged that the bylaws were “contractually invalid” because they were unilaterally adopted by the Board.⁵² Therefore, only the “facial statutory and contractual validity of the bylaws” would be determined, and not “how the bylaws might be applied in any future, real-world situation.”⁵³

1. Delaware Court of Chancery’s Finds the Forum Selection Bylaws Statutorily Valid

To begin with, in *Franz Manufacturing Co. v. EAC Industries*, the Delaware Supreme Court previously held that bylaws were presumed valid and would be construed by the courts in a “manner consistent with the law.”⁵⁴ As a result, the *Boilermakers* court ruled that the burden was on the Plaintiffs to show that the bylaws did not “address proper subject matters” as defined by section 109(b) of the DGCL.⁵⁵

The Plaintiffs attempted to bear this burden by arguing the bylaws were invalid because they regulated novel, as opposed to traditional, subject matter.⁵⁶ Specifically, Plaintiffs argued that the bylaws were invalid because the Board stepped beyond traditionally regulated internal matters, such as “stockholder meetings, the board of directors and its committees, and officerships.”⁵⁷ Thus, Plaintiffs argued, the

48. *Id.*

49. *Id.*

50. *Boilermakers*, 73 A.3d at 945.

51. *Id.* at 938.

52. *Id.*

53. *Id.* at 948. The court combined the separate claims against Chevron and FedEx under Delaware Court of Chancery Rule 42(a) because the actions contained a “common question of law” and it was more efficient to decide “any or all matters” at once. *Id.* at 946.

54. *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (1985).

55. *Boilermakers*, 73 A.3d at 949.

56. *Id.* at 952.

57. *Id.* at 951.

Board was exceeding its statutory authority by regulating beyond, or external to, internal corporate matters and venturing into novel territory.⁵⁸

The court found Plaintiff's claim and reasoning to be "dubious" for four reasons. First, the court stated that bylaws had a "procedural, process-oriented nature" in addition to their statutory internal nature.⁵⁹ By analogizing to advance notice bylaws, the court found that the act of deciding ahead of time where the shareholders could bring suit was acting within the internal affairs of the corporation.⁶⁰ The court determined that by deciding what forum shareholders could bring suit, the Board was governing the internal affairs arising from the relationship between directors, officers, and shareholders.⁶¹ By making this decision, the Board would effectively prevent a situation that would likely result in a "chaotic stockholder meeting."⁶² Therefore, because the Board was governing the relationship between the Board and the shareholders, it was governing the business of the corporation within, and not external to, section 109(b) of the DGCL.

Second, the court recognized the external concern, but reasoned that because the bylaws regulated procedural matters concerning "*where* the stockholder may file suit, not *whether* the stockholder may file suit," the bylaws did not limit the "rights and powers of the stockholder *as a stockholder*."⁶³ In other words, because the forum selection clause did not deprive the shareholders of exercising their right to go to court, but instead limited where a case could be brought, the bylaws were not invalid.⁶⁴

Third, the court found that the 'novel' subject matter actually was not 'novel' at all. Prior to this suit, the United States Supreme Court

58. *Id.*

59. *Id.*

60. *Boilermakers*, 73 A.3d at 952.

61. *Id.* at 951-52.

62. *Id.* at 952.

63. *Id.* at 952 (emphasis in original). The Chevron bylaw stated as follows:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants.

Id. at 942 (emphasis in the original).

64. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (finding it is a shareholder right to not be "deprived of his day in court").

and Delaware Supreme Court both found that forum selection clauses within limited liability corporation ("LLC") and stockholder agreements were statutorily valid.⁶⁵

Finally, the fact that the bylaws reached into an unregulated subject matter did not automatically imply invalidity.⁶⁶ Essentially, Plaintiffs argued the Board was limited by the plain meaning of section 109(b) and, thus, because the bylaw was invalid, the statute did not plainly express any authority allowing the Board to regulate the external, or procedural, affairs.⁶⁷ Again, the *Boilermakers* court did not agree.⁶⁸ Following the lead of the Delaware Supreme Court in *Unocal Corp. v. Mesa Petroleum Co.*, the court did not recognize section 109(b), or the rest of the DGCL, as "static."⁶⁹ Instead, Delaware interpreted the DGCL as a living document that was meant to "grow and develop in response to, [and] in anticipation of, evolving concepts and needs."⁷⁰ Thus, the court found that just because the statute was silent in regard to a specific matter, the silence did not automatically imply that it was prohibited.⁷¹ Therefore, the Court of Chancery ultimately found that the bylaws were statutorily valid.⁷²

2. Delaware Court of Chancery finds the Forum Selection Bylaw Contractually Valid

Although the Court of Chancery held the bylaws statutorily valid, the court had to decide whether the bylaws were contractually valid.⁷³ In defense of Count IV, Plaintiffs argued that the unilaterally adopted forum selection law was not enforceable because the shareholders did not get the opportunity to vote for or against the adoption of the bylaw.⁷⁴ Though the clause passed without the opportunity to vote, the court found the shareholders impliedly consented to the bylaw.⁷⁵ The implied consent was established by a shareholder purchasing or keep-

65. *Boilermakers*, 73 A.3d at 953 (citing *Elf Atochem N. Am., Inc. v. Jaffair*, 727 A.2d 286 (Del. 1999); *Baker v. Impact Hldg., Inc.*, No. 4960-VCP, 2010 Del. Ch. LEXIS 111, at *1 (Del. Ch. May 13, 2010)). See *infra* Part IV.

66. *Id.* at 953.

67. *Id.* at 951, 953.

68. *Id.* at 953.

69. *Id.* at 953; *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del 1985) (quotation omitted).

70. *Boilermakers*, 73 A.3d at 953; *Unocal*, 493 A.2d at 957.

71. *Boilermakers*, 73 A.3d at 953; *Unocal*, 493 A.2d at 957; see e.g. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 559 (2014) (finding fee-shifting bylaws were legally possible because "neither the DGCL nor any other Delaware statute forbid[] the enactment . . .").

72. *Boilermakers*, 73 A.3d at 954.

73. *Id.*

74. *Id.* at 954-55.

75. *Id.* at 956.

ing stock while having notice that the board had the power, as provided by the articles of incorporation, to adopt an arbitration clause without shareholder approval.⁷⁶

Plaintiffs first argued that the bylaw was invalid because the vested rights doctrine restricts the board from "dimish[ing] or divest[ing] pre-existing shareholder rights" without the consent of the shareholders.⁷⁷ However, the Court of Chancery, in *Kidsco Inc. v. Disnmore*, found the vested rights doctrine was inapplicable to shareholder claims where the shareholders had notice that the Board had the possibility of making unilateral bylaws.⁷⁸ Because both Chevron's and FedEx's articles of incorporation gave the Board the power to adopt and amend bylaws, former and new shareholders alike had notice of the possibility that the Board would enforce their power. Therefore, the court held the claim did not fall within the vested rights doctrine.⁷⁹

The court did not end the argument with the vested rights doctrine. Instead, the court moved on to explain exactly why the shareholders were, or should have been, notified of this possibility.⁸⁰ Ultimately, the court found the corporation, shareholders and Board all consented not only to be bound by the DGCL, but also to be bound to the possibility of unilateral Board action.⁸¹

At the beginning of its analysis, the court found that before the corporation formed, shareholders and directors had the option to seek forums outside of the state of Delaware in which to incorporate.⁸² However, because the corporation, shareholders and directors all chose Delaware to incorporate, Delaware law bound them all.⁸³

Next, the court reasoned that because the shareholders were incorporated under Delaware corporate law, the roles of the shareholders and directors were determined by section 109(a) of the DGCL.⁸⁴ Under section 109(a), the power to adopt, amend or repeal bylaws transfers to a board only if the corporation provides so within the arti-

76. *Id.*

77. *Boilermakers*, 73 A.3d at 956.

78. *Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) (finding that this Court has held that where a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment). *See also* *Roven v. Cotter*, 547 A.2d 603, 608 (Del. Ch. 1988).

79. *Boilermakers*, 73 A.3d at 939-40.

80. *Id.* at 956.

81. *Id.*

82. *Id.*

83. *Id.* at 958.

84. DEL. CODE tit. 8, § 109(a); *Boilermakers*, 73 A.3d at 956-57.

cles of incorporation.⁸⁵ Thus, by voting for the articles of incorporation or by buying the corporation's stock after the articles were written, the shareholders consented to this possibility and "explicitly allow[ed]" the Board to draft, amend, and implement the forum selection bylaws.⁸⁶

Despite the fact that the shareholders gave their power to amend and adopt to the Board, Plaintiffs argued that shareholders still had a right to vote to approve the bylaws.⁸⁷ Plaintiff's reasoned that shareholder consent ended when the power was dedicated to the Board.⁸⁸ Thus, when the Board takes the next step and enforces the right, the shareholders need to confirm the move.⁸⁹ However, the court stated that once the articles of incorporation were filed, the consent created a binding contract, which in turn created an overarching consent to the Board's actions.⁹⁰ As such, the court determined that the bylaw was not only statutorily valid, but also contractually binding under Delaware law.⁹¹

In closing, the court recognized the continuous tug-of-war between shareholder and Board authority and determined that shareholders had multiple protections against unsatisfactory unilateral Board decisions.⁹² For example, although the articles of incorporation gave the power to the Board to create and amend bylaws, the shareholder right in the same process never disappeared.⁹³ Instead, the shareholders still reserved the right to repeal, amend, or adopt a new bylaw thereby replacing the unilaterally adopted bylaw.⁹⁴ After all, neither bylaws, nor articles of incorporation are permanent.⁹⁵ Because the shareholders reserved their rule-making right, they provide a check on the actions of the directors, theoretically resulting in bylaws pleasing both parties.⁹⁶

In addition, another protection the shareholders possessed was the power to vote to replace or oust directors when they are up for elec-

85. DEL. CODE tit. 8, § 109(a) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors.").

86. *Boilermakers*, 73 A.3d at 956.

87. *Id.*

88. *Id.* at 956.

89. *Id.*

90. *Id.*

91. *Boilermakers*, 73 A.3d at 958.

92. *Id.* at 956-57.

93. DEL. CODE tit. 8, § 109(a); *Boilermakers*, 73 A.3d at 956.

94. DEL. CODE tit. 8, § 109(a); *Boilermakers*, 73 A.3d at 956.

95. *Id.* at 956-57.

96. *Id.* at 956.

tion.⁹⁷ Not only does this provide another check on director actions, it also allows the shareholders to elect a person whose views reflect that of the shareholder.⁹⁸

The final protection the court mentioned was the protection shareholders get by subjecting the bylaws to “as-applied” review when within the courts.⁹⁹ In *Bremen v. Zapata Off-Shore*, the United States Supreme Court held forum selection clauses would be presumed valid if they were adopted “unaffected by fraud, undue influence, or overweening bargaining power”¹⁰⁰ However, *Bremen* found that the clauses could be found to be invalid in real-world situations, as opposed to hypothetical situations, if the bylaws were found to be “unreasonabl[e] and unjust[]” as-applied.¹⁰¹ Therefore, when a court finds the bylaw to be reasonable and just as-applied, the bylaw is found to be valid.¹⁰²

In the end, the Delaware Court of Chancery found the bylaws were both statutorily valid and contractually valid.¹⁰³ The result from the case not only allowed Chevron and FedEx to keep and enforce the forum selection clauses, but it also opened the door for directors and officers in other corporations, under the same or similar circumstances, to adopt forum selection clauses without the need of shareholder approval.

IV. ANALYSIS

A. *The Next Step: Unilaterally Passed, Mandatory Arbitration Clauses*

Court precedent is not only used to clarify questions of law, but it can also be used to provide guidelines regarding how actors are supposed to act in certain situations. Through its opinion in *Boilermakers*, the Delaware Court of Chancery provided a road map to answer the question regarding what a board of directors of a Delaware incorporated corporation can do in order to have valid and enforceable forum selection bylaws. Now that the question regarding forum selection bylaws has been answered, the next logical question would be to

97. *Id.*

98. *Id.*

99. *Boilermakers*, 73 A.3d at 957.

100. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972); see also *Nat'l Indus. Gp. v. Carlyle Inv. Mgmt., LLC*, 67 A.3d 373, 381 (Del. 2013) (applying the *Bremen* test); *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (applying the *Bremen* test).

101. *Bremen*, 407 U.S. at 10; *Boilermakers*, 73 A.3d at 957.

102. See *Boilermakers*, 73 A.3d at 957.

103. *Id.* at 963.

ask whether the same outcome would result if, under the same or similar circumstances as *Boilermakers*, an arbitration clause unilaterally adopted by a board of directors would be upheld.

As mentioned above, the court in *Boilermakers* provided a road map regarding the question of whether a forum selection bylaw was valid and enforceable. This road map will indicate that, if the Delaware Court of Chancery is presented with the question of whether a unilaterally adopted arbitration bylaw is valid and enforceable under the same or similar circumstances as presented in *Boilermakers*, the Court of Chancery would uphold the bylaw.

In order to come to this determination, the court would have to follow the same analysis as *Boilermakers*, with possibly one exception. In *Boilermakers*, the court used state common law to determine that forum selection bylaws were presumed valid until proven that they were “[affected] by fraud, undue influence, or overweening bargaining power”¹⁰⁴ or found to be “unreasonabl[e] and unjust[]” as-applied.¹⁰⁵ Because *Boilermakers* dealt with a forum selection clause governed by state common law, and this scenario deals with an arbitration clause governed by statute, the first question answer is whether the analysis differs given the distinction.

Unlike forum selection, state and federal statutes govern arbitration. Depending on the circumstances of the case and the content of the arbitration clause, the arbitration clause could either be governed by the Federal Arbitration Act (“FAA”)¹⁰⁶ or, in Delaware, the Delaware Uniform Arbitration Act (“DUAA”).¹⁰⁷ Therefore, unlike the analysis for forum selection clauses that rely primarily on federal and state common law, the analysis for arbitration clauses has to take into account federal and state arbitration statutes in addition to federal and state common law. Luckily, however, the Delaware Court of Chancery has provided a test regarding this issue in *DaimlerChrysler Corp. v. Matthews*.¹⁰⁸

B. *DaimlerChrysler and the Test for Validity and Enforceability*

In *DaimlerChrysler*, Defendant purchased a defective truck from his employer, Plaintiff.¹⁰⁹ At the closing of the purchase, Defendant signed the “Employee New Vehicle Purchase/Lease Claim Form”

104. *Bremen*, 407 U.S. at 10.

105. *Id.* at 16; *Boilermakers*, 73 A.3d, at 957.

106. See 9 U.S.C.A. § 2.

107. See DEL. CODE tit. 10, § 5701.

108. 848 A.2d 577, 581-82 (Del. Ch. 2004).

109. *Id.* at 578.

("Claim Form") that provided all disputes would be resolved by the "DaimlerChrysler Vehicle Resolution Process, which includes mandatory arbitration that is binding on both DaimlerChrysler and [Defendant]."¹¹⁰ After Defendant had multiple issues with the truck, he moved to follow the "Customer Arbitration Process" but was denied because "he did not meet [the programs] residency requirements."¹¹¹ When Defendant filed suit, Plaintiff offered Defendant the arbitration option, but defendant denied.¹¹² Plaintiff then filed a petition to compel Defendant to submit to arbitration.¹¹³ The court was asked to determine whether the "arbitration provision in the Claim Form requires Defendant to submit all his claims to binding arbitration."¹¹⁴

The first question the Delaware Court of Chancery encountered was whether the arbitration agreement, or clause, was binding.¹¹⁵ To answer this question, the court had to decide which test to use for determining whether an arbitration clause was valid and enforceable. The court, knowing that the issue was governed by statute, turned to the FAA and DUAA for guidance and ultimately found the arbitration clause was not binding.¹¹⁶

The Delaware Court of Chancery found that both the FAA and the DUAA presumed arbitration agreements "valid, enforceable and irrevocable, 'save upon such grounds as exist at law or in equity for the revocation of any contract.'"¹¹⁷ In other words, the arbitration agreement would be presumed valid and enforceable only if the contract between the Plaintiff and Defendant was valid and enforceable. If the contract was invalid under law or if one party breached, "the non-breaching [sic] party [would be] entitled to treat the contract as terminated, i.e., as being at an end."¹¹⁸ Thus, in this situation, the arbitration clause would not be enforceable.

In sum, *DaimlerChrysler* provides that an arbitration clause is only as valid as the contract between the parties questioning the ability to arbitrate.¹¹⁹ Therefore, the distinction in between the forum selection

110. *Id.* at 578-579.

111. *Id.* at 580.

112. *Id.*

113. *DaimlerChrysler*, 848 A.2d at 580.

114. *Id.*

115. *Id.* at 581.

116. *Id.* at 581, 583.

117. *Id.* at 581 (quoting DEL. CODE tit. 10, § 5701 (emphasis added); 9 U.S.C. § 2 (emphasis added)).

118. *DaimlerChrysler*, 848 A.2d at 582.

119. *Id.* at 581.

clause analysis and the arbitration clause analysis is null; the validity of both the forum selection and arbitration clause rests on the validity of the contract supporting the clause.

C. *Elf Atochem and Corvex: Previous Arbitration Examples*

1. *Elf Atochem*: A Delaware LLC Example

As previously mentioned, the *Boilermakers* Court found forum selection clauses were not novel, because the Delaware Supreme Court previously analyzed the issue within the context of a limited liability corporation (“LLC”) in *Elf Atochem North America v. Jaffori*.¹²⁰ However, not only did *Elf Atochem* analyze a forum selection bylaw, it also analyzed an arbitration bylaw as well.

In *Elf Atochem*, Plaintiff and Defendants agreed to form a LLC, which was governed by a series of agreements.¹²¹ The most important of these was the Agreement, which was “a comprehensive and integrated documents . . . setting forth detailed provisions for the governance of [the] LLC.”¹²² All parties signed the Agreement, with the exception of the LLC.¹²³

When the company failed to take off, Plaintiff failed suit in Delaware alleging breach of fiduciary duties among other claims.¹²⁴ The Defendants moved for a motion to dismiss for lack of subject matter jurisdiction pursuant to the Agreement.¹²⁵ Within the Agreement were separate arbitration and forum selection clauses.¹²⁶ The arbitration clause provided that “any controversy or dispute arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in San Francisco, California.”¹²⁷ The forum selection clause provided that the members agreed to California as the “exclusive jurisdiction of the state and federal courts . . . [for] any action on a claim arising out of, under or in connection with this Agreement, provided such claim is not required to be arbitrated pursuant to [the arbitration clause].”¹²⁸ Due to the arbitration and forum

120. 727 A.2d 286 (Del. 1999).

121. *Id.* at 288.

122. *Id.*

123. *Id.*

124. *Id.* at 289.

125. *Elf Atochem*, 727 A.2d at 289.

126. *Id.* at 288.

127. *Id.*

128. *Id.* at 288-89.

selection clauses, the Court of Chancery agreed with Defendants and dismissed the case.¹²⁹

Plaintiff appealed the decision claiming that the “Court of Chancery erred in holding that the arbitration and forum selection clauses in the Agreement governed”¹³⁰ Plaintiff argued that the forum selection clauses did not govern because the LLC never signed the Agreement and, thus, was “not bound to the forum selection agreements.”¹³¹ The Delaware Supreme Court disagreed and found that the LLC did not have to sign the Agreement to be bound to the Agreement. The court held that under the Delaware Limited Liability Company Act (“Delaware LLC Act”), only the “member or members” had to sign the agreement because the members “are the real parties in interest,” not the LLC.¹³² Therefore, although the LLC did not sign the Agreement, and, thus, the members who formed the LLC did, the LLC was bound by the arbitration and forum selection clauses.

Second, the Plaintiffs argued that Court of Chancery erred in characterizing Plaintiff’s claim as a direct suit instead of a derivative suit.¹³³ The Delaware Supreme Court found that the characterization was irrelevant because Plaintiff contracted its right away in the Agreement.¹³⁴ In other words, because the Agreement failed to “distinguish between direct and derivative claims” within the arbitration and forum selection clauses, it did not matter whether the claim was characterized as derivative of direct.¹³⁵ Instead, Plaintiff agreed that “*any* claim arising out of or related to this Agreement” would either be arbitrated or heard before a court in California.¹³⁶ Thus, Plaintiff’s second argument was failed.¹³⁷

Third, Plaintiff argued that, even if the LLC was bound to the Agreement, the clauses were invalid under the Delaware LLC Act, specifically section 18-109(d).¹³⁸ In particular, Plaintiff argued that the Delaware LLC Act specifically granted the Court of Chancery “subject matter jurisdiction over its claims for breach of fiduciary duty . . . even though the parties contracted to arbitrate all such claims in

129. *Id.* at 289.

130. *Elf Atochem*, 727 A.2d at 289.

131. *Id.* at 289.

132. DEL. CODE tit. 6, § 18-101(7); *id.* at 293.

133. *Elf Atochem*, 727 A.2d at 289.

134. *Id.* at 293-94.

135. *Id.* at 294.

136. *Id.* (emphasis in original).

137. *Id.* at 295.

138. *Elf Atochem*, 727 A.2d at 289.

California.”¹³⁹ Again, the Delaware Supreme Court disagreed.¹⁴⁰ First, the court held that it was “the policy of the Act . . . to give the maximum effect to the principle of freedom of contract,” and, thus, the parties were allowed to contract out of the statute for a more convenient forum.¹⁴¹ In addition, the court noted that its decision was “bolstered by the fact that Delaware recognizes a strong public policy in favor of arbitration,” when there is no doubt of the intention to arbitrate.¹⁴² Here, because all members of the LLC signed the Agreement, the court found no evidence of the doubt to arbitrate.¹⁴³

Then, the Court analyzed section 18-109(d) of the act, which provides

a member or members *may* consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction of the State of Delaware.¹⁴⁴

Plaintiff believed this section “prohibit[ed] vesting exclusive jurisdiction in a court outside of Delaware” and, hence, the arbitration and forum selection clauses were invalid.¹⁴⁵ The Delaware Supreme Court disagreed and found that the section “delineated options for subject matter jurisdiction,” but that the parties did not have to choose solely from these options.¹⁴⁶ The Court reasoned that if the “General Assembly intended to prohibit the parties from vesting exclusive jurisdiction in arbitration or court proceedings in another state, it could have proscribed such an option.”¹⁴⁷ But, just because the Assembly was silent on the matter did not mean that “parties must agree to the *exclusive* jurisdiction of a foreign jurisdiction.”¹⁴⁸

In the end, the Delaware Supreme Court found that both the arbitration and forum selection provisions were enforceable and, as a result, affirmed the Court of Chancery’s judgment.¹⁴⁹

The *Elf Atochem* analysis provides two important points in regard to whether a Delaware court will uphold an unilaterally passed, mandatory arbitration clause. First, *Elf Atochem* enforces the stan-

139. *Id.* at 295.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Elf Atochem*, 727 A.2d at 295.

144. DEL. CODE tit. 6, § 18-109(d); *id.*

145. *Elf Atochem*, 727 A.2d at 296.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

dard that it is the public policy of Delaware courts to uphold a mandatory arbitration clause if there is not any doubt that the parties agree to arbitrate.¹⁵⁰ As the *Boilermakers* provided, shareholders give their consent to the directors, and thus to arbitrate, when they buy or keep their shares in the company.¹⁵¹ Second, it shows that the Delaware courts are consistently interpreting silence as the freedom to act, as opposed to the prohibition of action. In other words, just because a statute is silent, or fails to provide an answer as to what actors can or cannot do, the lack of guidance does not automatically imply that the act is prohibited.¹⁵² Therefore, because the DGCL allows shareholders to defer the power to adopt, amend and repeal to the directors, but is silent as to exactly what this entails for the directors, it does not automatically mean that directors lack the ability to unilaterally adopt clauses.

2. *Corvex*: A Maryland Comparison

Similar to *DaimlerChrysler* and *Elf Atochem* cases, *Corvex* analyzes the issue of whether an arbitration clause is enforceable.¹⁵³ Unlike the employer-employee, buyer-seller relationship of *DaimlerChrysler*, *Corvex* analyzes the issue in regard to the shareholder-corporation relationship, which provides a helpful example to how a Delaware court may analyze the issue.

In *Corvex*, the Plaintiffs owned 4.90% of Defendant's shares of the company¹⁵⁴ and were in the process of entering into an "unsolicited, hostile takeover" of the Defendant's corporation.¹⁵⁵ Defendant tried to combat the takeover by moving to enforce its arbitration bylaw, but Plaintiffs ignored the notion and filed suit in court in order to enforce the transaction.¹⁵⁶

Defendant's bylaws included a clause stating:

Any disputes, claims or controversies brought by or on behalf of any shareholder of the Trust . . . shall, on the demand of any party to such Dispute, be resolved through binding and final arbitration in accordance with the Commercial Arbitration Rules (the "Rules") of the American Arbitration Association ("AAA").¹⁵⁷

150. *Elf Atochem*, 727 A.2d at 295.

151. *Boilermakers*, 73 A.3d at 956.

152. *See id.* at 953; *Elf Atochem*, 727 A.2d at 296.

153. *Corvex Mgmt., LP v. Commonwealth Reit*, No. 24-C-13-001111, 2013 Md. Cir. Ct. LEXIS 3, *5 (May 8, 2013).

154. *Id.* at *3.

155. *Id.*

156. *Id.*

157. *Id.* at *5-6.

As a result of the Bylaw and in defense to the takeover, Plaintiffs claimed that Defendant's breached their fiduciary obligations to the shareholders and filed a Petition to Stay Arbitration.¹⁵⁸ Defendants then filed an Opposition to Plaintiffs Petition to Stay Arbitration.¹⁵⁹ Plaintiffs, in return, claimed that the arbitration clause was not enforceable "for the simple reason that the Plaintiffs never assented to them" because they believed that an "explicit agreement is essential to the formation of an enforceable arbitration contract."¹⁶⁰ Therefore, the threshold question before the Maryland Circuit Court was whether the arbitration clause was a "valid and enforceable" agreement.¹⁶¹

In its analysis on whether the arbitration clause was enforceable, the Maryland Circuit Court had to determine whether the "parties [had] knowledge of and [had] consented to an arbitration agreement."¹⁶² The reasoning is that the presumption in favor of arbitration does not apply unless 1) there is an agreement between the parties to arbitrate and 2) the claim arose within the scope of the arbitration agreement.¹⁶³

Initially, Plaintiffs argued that because they did not expressly agree to the arbitration clause, they were not parties to the arbitration agreement.¹⁶⁴ The court rejected this argument for two reasons. One, the Maryland Circuit Court determined that an express agreement to arbitration was too high of a hurdle for the purpose of enforceability.¹⁶⁵ In fact, the court found that both the FAA and Supreme Court precedent rejected the notion that arbitration agreements had to be "'express' and 'unequivocal' in order to be enforced."¹⁶⁶ Thus, when compared to "other contracts under state contract principles," the arbitration clause should be on "equal footing."¹⁶⁷

The Maryland Circuit Court rejected this argument for another reason because the Plaintiffs had both constructive and actual knowledge of the arbitration clause.¹⁶⁸ The court determined that Plaintiffs had

158. *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *3.

159. *Id.* at *1.

160. *Id.* at *24 (quoting *Kirleis v. Dickey, McCantey & Chilcote, P.C.*, 560 F.3d 156, 162-63 (3d Cir. 2009)).

161. *Id.* at *8-9.

162. *Id.* at *23.

163. *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *13.

164. *Id.* at *20.

165. *Id.* at *26.

166. *Id.* (citing *First Options v. Kaplan*, 514 U.S. 938, 944 (1995)).

167. *Id.* at *25.

168. *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *29-30.

constructive knowledge from obtaining the stock.¹⁶⁹ Specifically, the court noted that the stock certificate bore the legend:

This Certificate and the shares evidenced hereby are issued and shall be held subject to all of the provisions of the Declaration of Trust and Bylaws of the Trust and any amendments thereto. The holder of this Certificate and every transferee or assignee hereof by accepting or holding the same agrees to be bound by all of the provisions of the Declaration of Trust and Bylaws of the trust, as amended from time to time.¹⁷⁰

Therefore, when the Plaintiffs purchased the shares to the corporation, they knew their shares were subject to the bylaws of the company and, thus, were subject to the possibility of an arbitration clause.¹⁷¹ The court also determined that the Plaintiffs had actual notice of the arbitration clause from their due diligence because both “apparently investigated and analyzed [Defendant’s] Bylaws prior to purchasing stock.”¹⁷²

The next question the *Corvex* court had to determine was whether there was mutual assent and consideration of the arbitration clause.¹⁷³ The court found that both parties mutually assented, but in arguably different forms.¹⁷⁴ On one side of the contract, Plaintiffs voluntarily assented to the agreement when individual shareholders decided to purchase shares of Defendant’s stock.¹⁷⁵ On the other side, the Defendant’s assented to the arbitration clause through its obligation to arbitrate if the Plaintiffs brought a claim under the arbitration agreement.¹⁷⁶ In other words, if a situation arose where the Defendants wanted to litigate the issue before a judge but the Plaintiffs wanted to arbitrate, the Defendants would have to arbitrate the issue.¹⁷⁷ Thus, in the end, the court found the arbitration clause was valid and enforceable and ultimately denied Plaintiffs’ Petition to Stay Arbitration.¹⁷⁸

The analysis presented by the Maryland Circuit Court in *Corvex* is analogous to the argument the Delaware Court of Chancery made in *Boilermakers*. In *Boilermakers*, the court argued that express shareholder approval (i.e. shareholder vote) was not necessary because the

169. *Id.* at *29.

170. *Id.*

171. *Id.* at *29-30.

172. *Id.* at *30.

173. *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *29.

174. *Id.* at *36.

175. *Id.*

176. *Id.*

177. *Id.* at *36.

178. *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *47.

shareholders, by purchasing shares within the corporation incorporated under the laws of Delaware, “assent[ed] to not having to assent to board-adopted bylaws.”¹⁷⁹ Thus, comparatively, both the Maryland Circuit Court and the Delaware Court of Chancery find that express, as well as implied assent, are sufficient to support a finding of validity. Also, though it was not explicitly stated within the *Boilermakers* decision, both courts alluded to the fact that both parties would be confined to the location designated by the applicable clause.¹⁸⁰

D. Applying the Facts

Based on the above, all prior case law suggests that a Delaware court will validate a unilaterally passed, mandatory arbitration clause.

First, the Board must have the authority to adopt the bylaw. This is because an arbitration clause is only presumed valid, according to the *DaimlerChrysler* test¹⁸¹ and as evidenced by the *Corvex*,¹⁸² if the contract is valid. Under these circumstances, the arbitration bylaw would represent the contract between the shareholders and the corporation. If the bylaw is enforceable, then the arbitration clause is valid.

Second, the articles of incorporation must delegate the authority to “adopt, amend, or repeal bylaws” to the Board.¹⁸³ The reasoning behind this, is that section 109(a) of the DGCL provides that “[n]otwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstick [sic] corporation, upon its governing body.”¹⁸⁴ The *Boilermakers* court determined that this action of delegation represents the shareholders’ consent to the board to make or change bylaws.¹⁸⁵ Therefore, under the DGCL, if the articles of incorporation provide that the board of directors has the right to adopt, amend, and repeal bylaws, the bylaws become valid and enforceable without shareholder consent.

Next, the bylaw will have to regulate the correct subject matter. In order for the bylaw to be valid and enforceable, it must “relat[e] to

179. See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013).

180. See *id.* at 943-44 (providing that Chevron and FedEx added the clause as a way to “minimize or eliminate the risk . . . of duplicative litigation”); *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *36.

181. *DaimlerChrysler*, 848 A.2d at 581.

182. *Corvex*, 2013 Md. Cir. Ct. LEXIS 3, at *47.

183. DEL. CODE tit. 8, § 109(a).

184. *Id.*

185. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 958 (Del. Ch. 2013).

the business of the corporation, the conduct of its affairs, and its rights or powers" and cannot "inconsistent with law or with the certificate of incorporation."¹⁸⁶

In regard to these limitations, the *Boilermakers* court found that the unilaterally adopted bylaws were valid and enforceable if they regulated internal matters as opposed to external matters.¹⁸⁷ By regulating internal matters, the board would simultaneously be regulating "the business of the corporation" and keeping consistent "with the certificate of incorporation."¹⁸⁸

For this issue, the Court provided that if the bylaw dealt with the "rights and powers of the . . . stockholder as a stockholder" then it would be regulating an internal matter.¹⁸⁹ However, if the bylaw "purported to bind a plaintiff," for a personal tort (i.e. a suit arising from an injury at work) or contract (i.e. a suit arising from a private individuals undertaking with the corporation) the bylaw would be reaching beyond the board's authority because it would no longer be regulating the "stockholder as a stockholder."¹⁹⁰ In other words, the bylaw would be regulating what the stockholder could or could not do outside of its corporate capacity and, thus, would be regulating an external matter. In these situations, the board would be reaching beyond its authority.¹⁹¹

In regard to internal matters, the Court found that "bylaws, which help organize what could otherwise be a chaotic stockholder meeting . . . [or] a chaotic filing of duplicative and inefficient derivative and corporate suits against the directors and the corporations" regulate the stockholders in their corporate capacity and, thus, regulate internal matters.¹⁹² Thus, because the arbitration clause would, in this hypothetical, govern the stockholders in their corporate capacity, it would be regulating an internal matter. As a result, under these circumstances it is likely that the Delaware Court of Chancery would find this unilaterally passed, mandatory arbitration clause valid and enforceable.

186. DEL. CODE tit. 8, § 109(b).

187. *Boilermakers*, 73 A.3d at 952.

188. DEL. CODE tit. 8, § 109(b).

189. *Boilermakers*, 73 A.3d at 952.

190. *Id.*

191. *Id.*

192. *Id.* at 952.

V. IMPACT

A. *Should Corporations Take the Next Step and Adopt Mandatory Arbitration Clauses?*

As with any court decision, there will be positive and negative implications from a ruling upholding a unilaterally adopted mandatory arbitration clause. First, a positive outcome of a unilaterally adopted arbitration clause is that it will help the corporation control where a possible dispute would be settled. However, under that same note, a negative outcome is that the corporation will have to labor to determine the scope of the clause and expressly, precisely and clearly state what type of issue the clause is intended to cover.

For example, in *Parfi Holding AB v. Mirror Image Internet, Inc.*, the Delaware Court of Chancery was presented with an arbitration clause between contracting parties and was asked to determine whether the arbitration clause was valid and, second, whether the fiduciary duty claims arose within the scope of the arbitration clause.¹⁹³ In order to determine whether the claim was arbitrable, the court had to determine 1) “whether the arbitration clause [was] broad or narrow in scope” and 2) “whether the claim [fell] within the scope of the contractual provisions that require[d] arbitration.”¹⁹⁴ If the scope is narrow, then the claim will be arbitrated if it relates precisely to the claims provided within the provision.¹⁹⁵ If the scope is broad, then the court “will defer to arbitration on any issues that touch on contract rights or contract performance.”¹⁹⁶

In analyzing the fiduciary duty claims, the Delaware Supreme Court in *Parfi* determined that the “separate *rights* pursued by plaintiffs” under the contract had to be analyzed rather than the “conduct that led to potential claims.”¹⁹⁷ In addition, the court determined that the fiduciary duty claims were beyond the contract and “rest[ed] on an independent set of rights provided for in the Delaware corporation law” as opposed to the “short-lived obligations bargained for in the [agreement.]”¹⁹⁸ Ultimately, the Delaware Supreme Court held that “absent a clear expression of an intent to arbitrate breach of fiduciary duty claims,” the claims would be heard within the Delaware court system.¹⁹⁹

193. 817 A.2d 149, 154-155 (Del. 2002).

194. *Id.* at 155.

195. *Id.*

196. *Id.*

197. *Id.* at 156 (emphasis in original).

198. *Parfi*, 817 A.2d at 158.

199. *Id.* at 160.

Therefore, this case brings to light two important points. First, the court is strict in their analysis of what is covered by the language of the arbitration clause. Second, the corporation can include a broad arbitration clause, but must expressly state claims, such as a breach of fiduciary duty, if the corporation intends to the arbitration clause to cover such claims. Or, in the alternative, expressly state which claims are not to be arbitrated. Though determining what claims to include within the clause will be tedious, it may be beneficial for the corporation because it will force the corporation to analyze which potential claims are better suited for litigation and which are better suited for arbitration. Otherwise, as explained above, despite the corporation's best efforts, the clause will not guarantee that the corporation will stay out of court.

There are other factors the corporation needs to take into account other than whether a particular claim is better litigated or arbitrated. Broadly speaking, the corporation needs to conduct a cost benefit analysis regarding the negative and positive implications a mandatory arbitration clause may have on the corporation. For example, although there is no guarantee that the arbitration proceeding will take less time than going to court, the ability to control the situation means that the corporation can spend more time making improvements to the corporation which will likely result in a greater economic value for the corporation.²⁰⁰ This is not only good for corporate business and its governance; it is also beneficial for the shareholders. The more time and money the corporation is able to save, the more profit the corporation is likely to make. The more profit the corporation makes, the higher the dividend the shareholder could possibly receive for owning shares or the higher the stock price.

Another shareholder benefit is the fact that the shareholders will not have to take into account the expense that going to court will have on the corporation and, thus, will have on their dividend or the corporations stock prices. Though shareholders bring claims on behalf of the corporation to save the corporation from wrongdoings of the directors, the act of going to court itself costs the corporation even if the money, say for embezzling, is returned. Also, there is nothing to indicate that the shareholders will win if they go to court. In these cases, the shareholders not only lose the case, but the money the corporation spends going to trial will no longer be available for shareholder dividends.

200. Farinacci, *supra* note 16, at 752.

While it may be beneficial for the corporate world to have the ability to adopt mandatory arbitration clauses, it may also be a detriment. For one, it affords Delaware law and corporations alike limited predictability. First, if corporations are able to use these clauses to prevent shareholders from reaching the courtroom altogether there is a possibility that the predictability established by precedent of the Delaware courts will slowly decrease over time.²⁰¹ The more cases that go to arbitration, the less precedent there is for corporate in-house lawyers to use to consult the board of directors prior to making business decisions.

Second, because the arbitration proceedings usually happen behind closed doors and likely do not reach the public,²⁰² the outcome of the proceedings may not be uniform.²⁰³ Along with uniformity, the outcome may be ad hoc.²⁰⁴ Although the negotiated law of the agreement will govern the arbitration proceeding, it is difficult to say whether an arbiter is qualified to make the decision.²⁰⁵ For example, an arbiter may be chosen for the sole reason that he is a specialist in a certain area of business, not necessarily due to his experience with the law.²⁰⁶ However, although the individual is a specialist, there is no indication that that individual will be able to correctly apply the law to the facts of the case because he may not be familiar with how to correctly read or interpret the precedent or law.

Another possible issue is the fact that once an arbitral award is decided, the award is very difficult, but not impossible, to appeal.²⁰⁷ Once an arbiter renders a final judgment, the path the parties have to take to overturn the award may be more troubling and expensive than if the parties litigated the issue in the first place.

Take *Travelers Ins. Co. v. Nationwide Mut. Ins. Co.* for example.²⁰⁸ In *Travelers*, Plaintiff asked the court, via motion of summary judgment, to enforce an arbitration award that was made in favor of Plain-

201. See W. Mark. C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1099 (2012).

202. Cf. *id.* at 1095 (finding that arbitrators in employment and class action hearings “routinely write lengthy awards that are substantially devoted to legal analysis and that often make extensive use of precedent.”)

203. Farinacci, *supra* note 16, at 752.

204. See Weidemaier, *supra* note 168, at 1095.

205. Farinacci, *supra* note 16, at 752.

206. See *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARBITRATION ASS’N 1, available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878 (last visited Feb. 1, 2015).

207. See *Travelers Ins. Co. v. Nationwide Mut. Ins. Co.*, 886 A.2d 46, 46 (Del. Ch. 2005).

208. *Id.*

tiff and which Defendant refused to pay.²⁰⁹ In response, Defendant filed a cross-motion of summary judgment to vacate the award.²¹⁰ The court noted that though "a decision reached by an arbitration panel is not reviewed on the merits by Delaware courts," if the situation meets one of the five statutory grounds for vacating an award, the award will be thrown out.²¹¹ However, the court noted that if there is evidence of a "manifest disregard of the law" the arbitration award would be vacated.²¹²

Thus, this case provides that there are two ways in which a corporation can vacate an award. The first way is for the corporation to show that the issue meets one of the five statutory grounds provided in the DUAA. Specifically, the corporation must show:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral except where the award was by confession, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706 of this title, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection; or
- (5) There was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection.²¹³

If the issue does not fit within one of these statutory grounds, the corporation's only other option is to show the award was made in manifest disregard of the law.²¹⁴ If the corporation can prove that one of

209. *Id.* at 47.

210. *Id.* at 51.

211. DEL. CODE tit. 10, § 5714(a); *Travelers*, 886 A.2d at 51.

212. *Travelers*, 886 A.2d at 48.

213. DEL. CODE tit. 10, § 5714(a).

214. *Travelers*, 886 A.2d at 48.

these two ways occurred, then there is a possibility, even if it is a small one, that the corporation will be able to vacate the award.

VI. CONCLUSION

In conclusion, this Note showed the progression and interaction of law and business surrounding the issue of forum shopping. A possible solution stemmed from a quick mention of the possibility of a forum selection clause in *Revlon*. Then-Vice Chancellor Strine's suggestion that corporations should take a pro-active step through their corporate governance spurred a movement by corporations to get these forum selection clauses into their articles of incorporation and bylaws by any means possible. The result was *Boilermakers*, a case providing a road map for how corporations can achieve the goal of getting a forum selection bylaw within its corporate governance without a prior shareholder vote.

This Note then analyzed the next logical step: the enforceability of arbitration clauses. In particular, this Note argued that if the Delaware Court of Chancery were presented with the issue under the same or similar circumstances as presented in *Boilermakers*, it would uphold a unilaterally adopted arbitration clause as valid and enforceable.

In summary, while there is a legal possibility that an arbitration clause may be upheld as valid and enforceable, a corporation should do its due diligence and decide exactly why it wants to adopt an arbitration clause and then write the clause in accordance with those values. Because, as *Parfi* presented, there is no guarantee that adopting an arbitration clause will keep a corporation out of court.



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